Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

WATER DISTICT NO. 1 OF
JOHNSON COUNTY, KANSAS,
Cross-Petitioner,

v.

VINCENT KOOPMAN,
Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Upon award of nominal damages in a §1983 civil rights case, can an appellate court reverse or modify the trial court's denial of attorney's fees and costs by substituting its own descretion without a finding of abuse in the trial court's exercise of discretion?

PARTIES

The parties in the court below are as follows:

Cross-Petitioner:	Water District No. 1 of Johnson County, Kansas (Water District No. 1 of Johnson County is a quasi-municipal corporation without any parent companies or subsidiaries)
Cross-respondent:	Vincent Koopman

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The Cross-Petitioner, Water District No. 1 of Johnson County, Kansas, a quasi-municipal corporation and defendant in the District Court, requests that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to determine whether an Appellate Court can reverse or modify a trial court's decision to award attorney's fees in civil rights cases involving nominal damages without making the finding of an abuse of discretion.

OPINIONS BELOW

The December 13, 1994, opinion of the Court of Appeals for the Tenth Circuit is reported as Koopman v. Water District No. 1 of Johnson County, Kansas, 41 F.3d 1417 (10th Cir. 1994), and is reproduced in the Appendix, filed by Cross-Petitioner at pp. A-1 - D-2.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was issued on December 13, 1994. A petition for rehearing and/or suggestion for rehearing en banc were timely filed and the Court denied both motions on January 30, 1995. This Court granted Cross-Respondent up to and including June 29, 1995, in which to file the petition for a writ of certiorari. Cross-Petitioner relies upon Rules of the Supreme Court of the United States 12.3 in filing its Cross-Petition For a Writ of Certiorari. Cross-Respondent attempted unsuccessfully to file his Petition For A Writ of Certiorari on June 19, 1995 and July 19, 1995. It was accepted by the Clerk in corrected form and file on July 28, 1995, with an effective docket date of June 29, 1995. Counsel for Cross-Petitioner did not receive notice of the filing of the Petition For A Writ of Certiorari by the Cross-Respondent but learned of the filing on August 23, 1995. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. §1988.

STATEMENT OF THE CASE

Cross-Respondent Vincent Koopman (hereinafter "Koopman") brought this action against Cross-Petitioner, Water Dis-

trict No. 1 of Johnson County, Kansas (hereinafter "the Water District"), R. L. Chandler, who was then general manager, Ralph G. Wyss, the department head, and Roger Fairbanks, Koopman's immediate supervisor. Koopman's claim arose out of his termination as a "Utility Man II". Koopman originated his lawsuit based upon three different claims.

Koopman's first claim under §1983 was that he was terminated in retaliation for exercising his First Amendment rights to free speech. In his second cause of action, also under §1983, Koopman alleged that he was terminated in violation of his right to procedural due process. His third cause of action was a pendent state law tort claim alleging that his discharge constituted a "retaliatory discharge" in violation of the laws of the State of Kansas. In Koopman's Complaint he prayed for both actual and punitive damages. Although he mentioned injunctive relief, Koopman eventually discontinued any action to obtain injunction relief against any of the defendants and made no request for injunctive relief at trial.

In the Pretrial Order filed on June 7, 1990, Koopman stated a claim for total damages of $275,000.00 and discontinued pursuit of any claim for punitive damages.

Upon a summary judgment motion the trial court dismissed all three claims and Koopman appealed. *Koopman v. Water District No. 1 of Johnson County*, 972 F.2d 1160 10th Cir. (1992). On appeal, Koopman discontinued pursuit on the First Amendment claim. The Tenth Circuit upheld the trial court's dismissal of the pendent retaliation claim. The Tenth Circuit reversed the trial court's dismissal of the due process claim and remanded for trial.

The case came on for jury trial November 2, 1992. At trial, the court found as a matter of law that the Water District failed to provide Koopman with proper pre-termination and post-termination procedures. The court further found that as a matter of law that Koopman failed to show he suffered any mental anguish or emotional distress arising out of the failure to provide proper termination procedure. The jury found that Koopman had a property right in continued employment with the Water District but that the Water District would have discharged Koopman whether he was afforded due process in connection with his discharge. Since Koopman did not prove he suffered any injury or damages, he received a nominal award of $1.00.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT DECISION TO OVERTURN THE DISTRICT COURT'S DENIAL OF ATTORNEYS FEES DESPITE NO SHOWING OF AN ABUSE OF DISCRETION IS IN CONFUSION WITH DECISIONS OF OTHER CIRCUITS.

The Tenth Circuit overruled the District Court's decision denying Koopman any attorney's fees. The decision appears to be based upon factual distinctions with *Farrar v. Hobby*, 506 U.S. _____, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992) and the determination by the panel that the case had "significant implications in establishing basic rights for public employees holding a similar property interest." However, the court made no findings that the District Court had abused its discretion. Two cases appear in accord with the trial court's decision below. In *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993) the court reversed an award of attorney's fees given to a winner of nominal damages based upon the weighing of factors identified in *Farrar* despite their being no showing of abuse of discretion. In *Craig v. Gregg County, Texas*, 988 F.2d 18 (5th Cir. 1993), the court determined that the plaintiff who had won a nominal award had no right to attorney's fees and upheld the lower court decision granting no attorney's fees despite the fact that the District Court gave no reason for the denial. No determination was made that the lower court had abused its discretion.

Three other Circuits have specifically held that a District Court can be reversed in a nominal damage case only if an abuse of discretion is found. *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir. 1994); *Caruso v. Forslund*, 47 F.3d 27 (2nd Cir. 1995); *Milton v. Des Moines, Iowa*, 47 F.3d 944 (8th Cir. 1995).

II. THIS CASE INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW.

This case involves an important question concerning the application of Farrar v. Hobby, 506 U.S. _____, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) in nominal damage cases.

The panel ruled the trial court acted improperly in denying Appellant's Motion For Attorney's Fees. In doing so, the court distinguished *Farrar v. Hobby* and cited with approval *Nephew v. City*

of Aurora, 830 F.2d 1547 (10th Cir. 1987) (en banc).

In *Farrar*, the United States Supreme Court held that a plaintiff who wins a nominal damage award is a "prevailing party" pursuant to 42 U.S.C. §1988. Therefore, the plaintiff may make application to the court for an award of attorney's fees. However, the court also held that when a plaintiff recovers only nominal damages because of a failure to prove an essential element of the claim for monetary relief, the only reasonable fee usually is no fee at all. The *Farrar* opinion stated as follows:

> In some circumstances, even a plaintiff who formally 'prevails' under §1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. As we have held, a nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his 'absolute' right to procedural due process through enforcement of a judgment against the defendant. (Citation omitted) In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. (Citation omitted) Whatever the constitutional basis for substantive liability, damages awarded in a §1983 action 'must always be designed to compensate injuries caused by the [constitutional] deprivation.' (Citations omitted)

Farrar, 121 L. Ed.2d at 505-06.

The *Farrar* court stated that if a plaintiff proves a constitutional violation but cannot prove an element of a claim for compensatory damages, the District Court normally should award no fee to plaintiff. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief (citation omitted), the only reasonable fee is usually no fee at all." *Farrar*, 121 L. Ed.d at 506.

The decision below cannot be reconciled with *Farrar*. The court relied on the majority decision of *Nephew* which seemed to have

been modified by *Farrar*. It appeared the *Farrar* majority had taken the view of the dissent in *Nephew*, that a nominal damage award should normally not entitle a plaintiff to an award of attorney's fees, particularly when the plaintiff's suit is directed at personal monetary damage relief. It follows that a trial court's decision to award no attorney's fees to a plaintiff winning a nominal award should not be overturned absent an abuse of discretion.

The Tenth Circuit decision adds to the confusion concerning whether a trial court has discretion to award no attorney's fees or costs to a plaintiff if his constitutional rights have technically been violated but he has suffered no damages. The *Farrar* decision seemed a clear indication that those litigants who have suffered a constitutional violation but have not been damaged cannot expect to receive an award of attorney's fees and that a district court decision denying fees will normally not be subject to review. However, the Tenth Circuit decision suggests that a district court's order denying attorney's fees on the basis of a nominal award will always be subject to independent and substituted review even if the trial court did not clearly abuse its discretion.

Although the *Farrar* decision settled the important issue of whether a party who obtains a nominal award of attorney's fees has the right to request the court grant its attorneys fees, further clarification is needed concerning the extent to which the trial court has discretion to award no attorney's fees without analyzing the fee application. Some Circuits seem willing to substitute their own judgment while others are deferring to the trial court's discretion. This court should further clarify the proper role of the trial courts and the appellate courts.

CONCLUSION

Cross-Petitioner respectfully requests that a Writ of Certiorari be issued and that this court grant review of the decision of the Court of Appeals for the Tenth Circuit, overturning the District Court's denial of an award of attorney's fees.

Dated: September 27, 1995.

Respectfully submitted,

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